82-1566

No. ____

Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

AARON BARANAN, *Petitioner*,

v.

FULTON COUNTY, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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QUESTIONS PRESENTED

1. May a state court refuse to enforce the Civil Rights Act, 42 U.S.C. §1983, and United States Constitution provisions when it does enforce parallel state constitution provisions arising out of the same set of facts in the same law case?
2. May a state court refuse to enforce 42 U.S.C. §1983 when there are official, willful violations of United States Constitution provisions?
3. May a state court refuse to enforce the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. §1988, when there are violations of 42 U.S.C. §1983, but attorney fees are disallowed under state law?

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No. .....

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

AARON BARANAN,

Petitioner,

vs.

FULTON COUNTY

Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF GEORGIA

The Petitioner, Aaron Baranan, prays that a writ of certiorari issue to review the decision and judgement of the Supreme Court of Georgia rendered in these proceedings on February 3, 1983.

DECISION AND JUDGEMENT BELOW

The decision of the Supreme Court of Georgia, Aaron Baranan v. Fulton County, not yet published, appears in the Appendix hereto.

JURISDICTION

The judgement of the Supreme Court of Georgia was entered on February 3, 1983. A petition for rehearing was denied on February 15, 1983, and this petition for certiorari was filed within ninety days of said denial. This Court's jurisdiction is invoked under 28 U.S.C. §1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

AMENDMENT IV:

"The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, ..."

AMENDMENT V:

". . . nor shall private property to be taken for public use, without just compensation."

AMENDMENT XIV, Sec. 1:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any State deprive any person of life, liberty or property without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U.S. STATUTES

42 U.S.C. §1983

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

42 U.S.C. §1988

'"In any action or proceeding to enforce a provision of section(s) . . .

1983 . . . of this title . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs."'

CONSTITUTION OF GEORGIA OF 1945

Art. I, Sec. III, Par. I.

". . . Private property shall not be taken, or damaged, for public purposes, without just and adequate compensation being first paid."

CONSTITUTION OF GEORGIA OF 1976

Art. I, Sec. III, Par. I.

". . . Private property shall not be taken, or damaged, for public purposes, without just and adequate compensation being first paid, except that when private property is taken or damaged for public road and street

purposes by the State and the counties and the municipalities of the State, just and adequate compensation therefor need not be paid until the same has been finally fixed and determined as provided by law, but such just and adequate compensation shall then be paid in preference to all other obligations except bonded indebtedness. The General Assembly may by law require the condemnor to make prepayment against adequate compensation as a condition precedent to the exercise of the right of eminent domain and provide for the disbursement of the same to the end that the rights and equities of the property owner, lien holders, and the State and its subdivisions may be protected."

CONSTITUTIONS OF GEORGIA OF

1945 and 1976

Art. I, Sec. I, Par. I.

"No person shall be deprived of life, liberty, or property, except by due process of law."

STATEMENT OF THE CASE

Petitioner, Aaron Baranan, is the owner of his home property in Fulton County. In 1973 the County decided to divert surface waters onto petitioner's property from a roadway some distance away as "the most economical and practical location to place it." The County refused to acquire an easement and made no attempts to condemn the property or right-of-way. In spite of petitioner's prior and continuing objections, the County commenced construction involving a

24" diameter transporter pipe, and petitioner initiated this suit for injunction. The Superior Court held it had no power to enjoin the County, which completed the construction, and the diverted waters poured onto the property. The Supreme Court of Georgia reversed the Superior Court, Baranan v. Fulton County, 232 Ga. 852 (209 SE.2d 188) (1974), holding that there is an implied right of action against a county when it violates a constitutional right of a citizen.

The water diversion continued, and on September 24 and 29, 1975, petitioner amended his petition, alleging the County was continuing to divert waters onto his property, charging the County with willfully violating his property and property rights, civil rights, and federal and state constitutional rights. Petitioner

sought nuisance damages, consequential damages, punitive damages and attorneys fees under both state and federal law pursuant to 42 U.S.C. §1983 and §1988. [R 53-55, 75]

On September 29, 1975, the Superior Court issued its findings and enjoined the County. Nevertheless, the County continued to divert waters onto the property, and damage continued.

A trial was held in May, 1977, at which the jury found that the County did create a nuisance and it is abatable, and awarded damages including punitive. On May 26, 1977, the Superior Court entered judgement accordingly and permanently enjoined the County. On appeal and cross-appeal, the injunction was undisturbed. The Supreme Court of Georgia found there was violation of the state constitution.

Punitive damages were stricken, but other damages allowed, and the Court stated the measure of damages should be the depreciation in market value of the property as a substitution for the damages recoverable in a condemnation action, Fulton County v. Baranan, 240 Ga. 837 (242 SE.2d 617) (1978). Nevertheless, the County continued to divert waters onto the property, and on Sept. 12, 1979 petitioner cited the County for contempt of court. A hearing was held but the trial judge never ruled. Subsequently, in May 1980, the County suddenly, over petitioner's protests, seized and blocked petitioner's only driveway entrance to the rear of his home, and continued said blockage.

On February 16, 1982, the Superior Court issued its Pre-Trial Order which

struck paragraph 11b of the pleadings relating to 42 U.S.C. §1983 damages [R 248], and attorneys fees were limited to those allowed by state law [R 249]. At trial, the judge ruled out petitioner's constitutional rights and civil rights [T 31, L 9-13]. The trial court charged,". . . You will not consider any comments that you heard about civil rights. This is not a civil rights action, so-called civil rights laws are Federal laws, and they are not administered in the courts of the State of Georgia. They are administered by the United States Courts." [T 698, L 19-24]. Objection was raised [T 716, L 16-21]. The trial court refused to give petitioner's charges #12 [R 310], #15 [R 312-313], #18 [R 315-316], #19 [R 317], and #20 [R 318] dealing with U.S. Constitutional Rights and Civil Rights.

The jury's special verdict included: damages for property depreciation - none; damages for deprivation of use and enjoyment of property - none; consequential damages - $15,000; whether the county acted in bad faith, was stubbornly litigious, or caused unnecessary trouble and expense so as to authorize an award of attorney fees - no. On March 1, 1982 the trial judge signed a judgement and on March 4, 1982 the trial judge signed an amended judgement that superceded and amended nunc pro tunc the judgement of March 1. The Amended Judgement made the jury verdict the judgement of the court [R 285-286]. On March 5, 1982, petitioner filed his request for attorneys fees and expenses pursuant to 42 U.S.C. §1983 and §1988 [R 287-292]. On March 10, 1982 petitioner filed his amended request for

attorneys fees and expenses pursuant to §1983 and §1988 [R 293-295]. On March 19, 1982, the trial judge denied said requests [R 325].

On appeal, the foregoing errors involving petitioner's federal constitutional and civil rights and 42 U.S.C. §1983 and §1988 were raised in Errors I, II, VI, VII, and IX of the Enumeration of Errors of the Appeal, and as Issues #1, #2, #6, #7 and #9 of the Brief thereto. The Supreme Court of Georgia affirmed the Superior Court.

ARGUMENT

REASONS FOR GRANTING CERTIORARI

1. May a state court refuse to enforce the Civil Rights Act, 42 U.S.C. §1983, and United States Constitution

provisions when it does enforce parallel state constitution provisions arising out of the same set of facts in the same law case? The state court of last resort has decided this important question of federal law in a way in conflict with applicable decisions of this Court.

Concerning the facts in this case, the Supreme Court of Georgia previously decided in Baranan v. Fulton County, 232 Ga. 852 (209 SE.2d 188) (1974), in Fulton County v. Baranan, 240 Ga. 837, 840 (242 SE.2d 617, 619) (1978), and in Duffield v. DeKalb County, 242 Ga. 432, 433 (249 SE.2d 235, 236) (1978) that petitioner's Georgia Constitutional rights had been violated. Specifically, these were violations of Georgia Constitution of 1945, Art. I, Sec. III, Par. I, and Art. I,

Sec. I, Par. I, and Georgia Constitution of 1976, Art. I, Sec. III, Par. I, and Art. I, Sec. I, Par. I. Portions of these paragraphs contain virtually the same language as portions of the Fifth and Fourteenth Amendments of the U.S. Constitution. The Fifth Amendment was made applicable to the States by the Fourteenth.

Yet, with the identical facts in the identical case, and with both state and federal constitutional protections involved by your petitioner, the Georgia Court, in its decision of Feb. 3, 1983, chose to enforce only the rights and provisions of the Georgia constitution and to utilize state tradition to override and refuse to enforce the identical rights and parallel provisions in the U.S. Constitution. This a state court

may not do, and a holding that an official, willful federal wrong is traditionally subordinate to state law is erroneous. Such refusal and tradition is in conflict with this Court's decisions in Testa v. Katt, 330 U.S. 386, 394, (1947), and Martinez v. California, 100 S.Ct. 553, 558 Footnote 7 (1980), which hold that where the same type of claim, if arising under state law, would be enforced in the state courts, the state courts are generally not free to refuse enforcement of the federal claims.

To have full meaning, the supreme law of the land must be fully available and the protection equally applied in state courts as well as in federal courts. Otherwise injured citizens will be stymied by traditions, and this

protection will be found fairly only in federal courts.

2. May a state court refuse to enforce 42 U.S.C. §1983 when these are official, willful violations of the United States Constitution? The state court of last resort has decided this federal question in conflict with the decisions of this court and the federal courts of appeal.

Every aspect of the facts in this case shows official willful seizure and deprivation of petitioner's home property by the county, beginning with the county's assessment of the home as the most economical location to put the waters, through the injunctions, and through the seizure and blockage of the driveway entrance. The county's actions

show a calculated willfulness contrary to federal constitutional rights involving the Fourth, Fifth, and Fourteenth Amendments. The county's failure to utilize normal protective condemnation proceedings, as provided to other persons, is inherently a denial of equal protection of the law. Further, the Supreme Court of Georgia decision of 1978 limited the damages because they "are a substitution for the damages recoverable in a condemnation action", and this was carried over into the decision of Feb. 3, 1983. The Georgia court's position thus erroneously equates an official unlawful inverse condemnation with a lawful straightforward condemnation.

Such equal protection rights, constitutional rights, home rights, and basic property rights are civil rights long

protected by this Court from official misconduct. Mapp v. Ohio, 367 U.S. 643 (1961), Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972). Via the Civil Rights Act, this Court has invoked its powers particularly when there is a substantial showing that the exertion of state power has overridden private rights secured by the U.S. Constitution. Owen v. City of Independence, Mo., 100 S.Ct. 1398, 1415 (1980). An exception has been those cases such as Parratt v. Taylor, 101 S.Ct. 1908, 1911 (1981), where the only specific constitutional claim was the loss of property without due process, and no official authorization was shown. Parratt was at most ordinary negligence by the state authority, since the loss of a prisoner's property was the result of a

random and unauthorized act by a state employee. In that case, the loss was not the result of some established state procedure, and the State could not have predicted precisely when the loss would occur.

There should not have been any difficulty distinguishing official willful injury and deprivation from unauthorized or negligent acts causing loss of property. Cases involving offical intent include Suthoff v. Yazoo County Ind. Dev. Corp., 637 F.2d 337, 339 (5th Cir. 1981); and Kimbrough v. O'Neil, 545 F.2d 1059, 1061 (7th Cir. 1976).

A case involving ordinary negligence, is York v. City of Cedartown, 648 F.2d 231, 232 (5th Cir. 1981). No official intent or authorization was shown by

either the pleadings or the facts; but the case happened to involve water, and it is therefore erroneously relied upon heavily by the state courts.

The Supreme Court of Georgia misread both Parratt and York, equated official willfulness with unauthorized negligence, ignored the Fourth and Fifth Amendments, due process, and equal protection of the law, and refused to enforce the Civil Rights Act. In the erroneous interpretation and reasoning of the Georgia courts, in a case involving a county's official, willful, and planned seizure of portions of a person's home without lawful condemnation proceedings, the damages would be limited by state tradition to the reduction in market value of the property.

If this misinterpretation and refusal is allowed to stand, there is nothing

to prevent state and county road building agencies from running roughshod over federal constitutional rights. It is necessary to draw a clear line of federal protection against official willful wrongs.

3. May a state court refuse to enforce the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. §1988, when there are violations of 42 U.S.C. §1983, but attorney's fees are disallowed under state law? The Supreme Court of Georgia has decided this federal question in conflict with the decisions of this Court.

The jury denied petitioner's attorney's fees according to state law. The trial judge then erroneously denied attorney's fees and expenses under 42 U.S.C. §1988 without further reason, and the Supreme Court of Georgia affirmed.

This decision is in conflict with New York Gas Light Club, Inc. v. Carey, 100 S.Ct. 2024 (1980), and Maine v. Thiboutot, 100 S.Ct. 2502 (1980). The question of attorney's fees under state law is irrelevant to §1988. Fees are available in any §1983 action whether the action is brought in federal or state court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgement and opinion of the Supreme Court of Georgia.

Respectfully submitted,

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In the Supreme Court of Georgia

Decided: Feb. 3, 1983

39200. AARON BARANAN v. FULTON COUNTY

GREGORY, Justice.

This case involving injunction and damages against a county for the drainage of surface waters onto appellant's property is making its third appearance before this court. See Fulton County v. Baranan, 240 Ga. 837 (242 SE2d 188) (1974).

Appellant owns property in Fulton County. In 1973, appellee rerouted local surface water drainage from Powers Ferry Road onto appellant's property, into two small existing draws. Appellant sought to enjoin the county from continuing this action. The superior court held it had no power to enjoin the county, and we

reversed. Baranan v. Fulton County, 232 Ga. 852 (209 SE2d 188) (1974).

The drainage across Baranan's property continued, and a temporary restraining order was issued against the county in 1975. Appellant amended his petition, alleging the county was continuing to divert waters across his property, charging the county with wilfully violating his property and property rights, civil rights, and federal and state constitutional rights. Appellant sought nuisance damages, consequential damages, punitive damages, and attorneys fees under both state law and federal law pursuant to 42 U.S.C. §1983 and §1988. Appellant also sought damages for personal injuries he sustained while assisting in the removal of a tree undermined by the diverted waters.

A jury trial was held, a permanent injunction was issued, and damages, including punitive damages, were awarded. On appeal, this court struck down the award of punitive damages and held that on retrial, the measure of damages should be the depreciation in market value of appellant's property caused by the diversion of surface waters. Fulton County v. Baranan, 240 Ga. 837 (242 SE2d 617) (1978).

On retrial appellant's pleadings relating to 42 U.S.C. §1983 damages were struck in a pre-trial order, and attorneys fees were limited to those allowed by state law. At trial, the judge ruled out evidence of appellant's personal injuries as an item of recovery in the case. The jury returned a special verdict finding: damages for property

depreciation - none; damages for deprivation of use and enjoyment of property - none; consequential damages - $15,000; whether the county acted in bad faith, was stubbornly litigious, or caused unnecessary trouble and expense so as to authorize an award of attorney's fees - no. The trial judge made this verdict the judgment of the court and denied appellant's request for attorney's fees and expenses under 42 U.S.C. §1988. For reasons which appear below, we affirm.

1. Appellant asserts his case presents a valid claim under 42 U.S.C. §1983 because Fulton County's maintenance of a continuing nuisance violated his federally guaranteed rights under the Fourth Amendment (right to be secure in one's home against unreasonable seizure), Fifth

Amendment (protection against taking of one's property for public purposes without adequate compensation), and Fourteenth Amendment (protection against deprivation of property without due process of law and the guarantee of equal protection under the law) of the United States Constitution. We disagree.

Nuisances are traditionally considered a field of tort liability subject to state law. See Prosser, Handbook on the Law of Torts, 4th Ed., §§86, 87. When a county maintains a nuisance, however, traditional tort remedies may be unavailable due to governmental immunity. See OCGA 36-1-4; Waters v. DeKalb County, 208 Ga. 741 (69 SE2d 274) (1952). Consequently, where the county is the alleged tortfeasor, we have allowed the cause of action under the theory that the county's

action is a violation of Art. I, Sec. III, Par. I of the Georgia Constitution. (i.e. no taking without just and adequate compensation.) Baranan v. Fulton County, 232 Ga. at 856. Because the states may offer their citizens greater protection through their own constitutions than is provided in the federal constitution, this does not necessarily mean that the same facts raise a valid cause of action under parallel provisions of the United States Constitution. See Creamer v. State, 229 Ga. 511(3) (192 SE2d 350) (1972).

The federal courts have considered an analagous case in York v. City of Cedartown, 648 F2d 231 (5th Cir. 1981), which we find dispositive of these alleged federal constitutional issues. In rejecting the theory that the maintenance

of a nuisance by a governmental body raised federal constitutional issues, the Fifth Circuit Court of Appeals explained: "Appellants have asserted that their constitutional rights not to be deprived of their property without due process of law has been violated because a appellee's tortious acts and maintenance of a nuisance have diminished the value of their property and damaged their dwelling. However, appellants have failed to allege facts suggesting an 'abuse of governmental power sufficient "to raise an ordinary tort by a government agent to the stature of a violation of the Constitution." 648 F2d at 232.1/

1/ In their opinion, the court also rejected the appellant's Fifth and Fourteenth Amendment issues. 648 F2d at 232, 233.

There is probably a potential federal constitutional issue in every suit against the state or its agents. While the broad purpose of 42 U.S.C. §1983 is to guarantee protection of federal rights, the federal courts have not read it as a vehicle for plaintiffs to litigate all simple tort suits (traditionally state protected rights) as federal constitutional violations. See Parratt v. Taylor _____ U.S. ___ (49 U.S.L.W. 4509) (1981). We do not intend to expand the scope of §1983 actions beyond the limits set forth by the federal courts. Here York v. City of Cedartown, supra, delineates that scope.

It was proper for the trial judge to strike appellant's pleadings relating to 42 U.S.C. §1983 damages and to deny his

request for attorney's fees and expenses pursuant to 42 U.S.C. §1988.

2. The facts show that a tree on appellant's property was undermined by the diverted waters. Appellant contracted with a third party to have the tree removed from his property. As part of that contract, appellant agreed to manually assist in removing the tree. After the tree was cut into logs, appellant assisted in loading the logs onto a truck. Appellant testified that while loading a large log onto the truck, he suffered a personal injury. Appellant argued that the necessity of removing the tree and resultant personal injury could reasonably have been foreseen by the county. The trial court ruled that a recovery for this personal injury would not be authorized in this case because it was not

proximately caused by the diversion of water. We agree with the trial court.

The test of when damages are generally too remote for recovery is set forth in OCGA 51-12-8: "If the damage incurred by the plaintiff is only the imaginary or possible result of a tortious act or if other and contingent circumstances preponderate in causing the injury, such damage is too remote to be the basis of recovery against the wrongdoer." See Gulf Oil Corp. v. Stanfield, 213 Ga. 436, 439 (99 SE2d 209) (1957) and cases cited therein.

While the facts might authorize a finding that the fallen tree resulted from the diversion of water, the personal injury suffered by appellant was the result of several circumstances. Appellant's decision to personally assist in

removing the tree and his action of lifting a log which was too heavy for him were consequences not reasonably foreseeable by the county. The personal injury suffered by appellant is too remote to be a basis of recovery in this case. See Blakely v. Johnson, 220 Ga. 572 (140 SE2d 857) (1965); Whittaker v. Jones, et al, 69 Ga. App. 711 (26 SE2d 545) (1943).

3. Appellant alleges that the trial judge erred in ruling that the attorneys at trial could refer to the previous litigation between the parties, but not to the results of that litigation. In his brief appellant argues that this prevented him from proving the county's willfulness by showing the county continued the nuisance after the superior court had issued a restraining order and permanent

injunction. After reviewing the portion of the record which forms the basis for appellant's complaint, we find no error.

It does not appear that appellant ever made an offer at trial of the evidence which he now argues should have been admissible. The statement made by the trial judge - "He can refer to a prior trial, but not the result of it" - was a ruling which allowed appellant to continue to refer back to the prior litigation over appellee's objection. It does not appear that appellant objected to any limitations that ruling may have imposed upon him at trial, so he will not now be permitted to complain. See, DeBerry v. State, 241 Ga. 204(1) (243 SE2d 864) (1978).

4. We have considered appellant's remaining enumerations of error and find

them to be without merit. The special verdict returned by the jury is supported by the evidence in the case, and it was properly made the judgment of the court.

Judgment affirmed. All the Justices concur, except Smith, J. dissents as to Divisions 2 and 3 and the judgment; Weltner, J. dissents as to Division 3 and the judgment.

SUPREME COURT OF GEORGIA

Atlanta, February 15, 1983. The Honorable Supreme Court met pursuant to adjournment. The following order was passed: Aaron Baranan v. Fulton County.

Upon consideration of the Motion for Rehearing filed in this case, it is ordered that it be hereby denied. All the Justices concur.

SUPREME COURT OF THE STATE OF GEORGIA,
Clerk's Office, Atlanta,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.
/s/ Joline B. Williams Clerk.

THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

AARON BARANAN,	:	
Plaintiff	:	CIVIL ACTION
v.	:	CASE NO. B-87694
FULTON COUNTY,	:	
Defendant	:	

O R D E R

In the above stated case, the Plaintiff has requested attorney fees and expenses as part of the costs of litigation. The request is made pursuant to 42 U.S.C. 1983, and 42 U.S.C. 1988, and covers the period through February 26, 1982.

After considering the same, and the amendment thereto, and hearing the views

of counsel of both parties, the said request is hereby Denied.

SO ORDERED. This 19th day of March, 1982.

/s/ Joseph H. Blackshear

Senior Judge, Superior Court

THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

AARON BARANAN,	:	
Plaintiff	:	CIVIL ACTION
v.	:	FILE NO. B-87694
FULTON COUNTY,	:	The judgement
Defendant	:	entered on March
	:	1, 1982 is hereby
	:	amended to read
	:	as follows

AMENDED JUDGEMENT

The above case coming regularly before this Court and a jury be tried during the week of February 22, 1982, and the jury returning a verdict on February 26, 1982, the verdict of the jury is hereby made the judgement of this Court:

ACCORDINGLY, IT IS HEREBY ORDERED, ADJUDGED AND DECREED: Damages for plaintiff for depreciation in market value of

plaintiff's property caused by the surface waters the County willfully diverted onto property of plaintiff.....$NONE;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED: Damages for plaintiff for deprivation of use and enjoyment of plaintiff's property.....$NONE:

IT IS FURTHER ORDERED ADJUDGED AND DECREED that the Defendant, FULTON COUNTY, has not acted in bad faith, been stubbornly litigious, or caused plaintiff unnecessary trouble and expense and that the plaintiff is not awarded any amount for attorney's fees;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED: Damages for plaintiff for cost of money and labor expended to try to relieve or reduce or offset damages, and consequential damages to plaintiff, and

injuries therefrom.....$15,000; AND DEFENDANT IS ORDERED TO PAY TO PLAINTIFF SAID SUM;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Costs be Cast upon the Defendant, FULTON COUNTY.

This Judgement supercedes and amends nunc pro tunc the Judgement entered March 1, 1982.

IT IS SO ORDERED.

This 4th day of March 1982.

/s/ Joseph H. Blackshear

Senior Judge Superior Court

SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

AARON BARANAN	:	
Plaintiff	:	CIVIL ACTION
v.	:	CASE NO. B-87694
FULTON COUNTY,	:	
Defendant	:	

P R E - T R I A L O R D E R

The above stated case having come before the Court in conference with counsel for both parties, and the Court having considered the Plaintiff's Proposed Pre-Trial Order, and Defendant's Motion to Dismiss for Failure to State Claim pursuant to Ga. Code Ann. Sec. 81A - 112(h), the Court rules as follows:

Statement of Facts

Plaintiff Aaron Baranan is the owner of a certain house and parcel of land

known as 5030 Rebel Trail, located in Fulton County. On October 17, 1973, the Plaintiff brought an action against Fulton County for alleged willful wrongs to his property involving diversion of surface waters, as finally amended. On May 26, 1977, a jury found that a nuisance exists and it is abatable, and awarded damages including $15,000.00 punitive damages.

Issues

I. The issue of damages for depreciation in market value of plaintiff's property caused by the surface waters the County willfully diverted onto property of plaintiff, and evidence thereof, shall be submitted to the jury.

II. The issue of damages for deprivation of use and enjoyment of property,

and evidence thereof, shall be submitted to the jury.

III. The issue of damages for cost of money and labor expended to try to relieve or reduce or offset damages, and consequential damages to plaintiff, and injuries therefrom, and evidence thereof, shall be submitted to the jury.

IV. With respect to plaintiff's contention as to damages under 42 U.S.C. §1983, Par. 11b of plaintiff's amendment of September 29, 1975, the Court concludes that the reasoning in York v. City of Cedartown, 648 F2d 231, 232 (1981) is pursuasive, and that in my opinion plaintiff can prove no set of facts which would entitle him to relief under §1983, and the Court rules and hereby dismisses said paragraph 11b. The Court makes this

ruling notwithstanding the following contentions of plaintiff:

a) The case at bar is distinguished from York, which alleges and deals solely with negligence, because the instant case involves intentional, willful, and wanton acts of the defendant.

b) That the ruling at bar is contrary to Kimbrough v. O'Neil, 545 F2d 1059, 1061 (1976), which states: "Our conclusion that a taking with intent (or reckless disregard) of a claimant's property by a State agent violates the Due Process Clause of the Fourteenth Amendment and is actionable under §1983 is in harmony with the decisions in other Circuits. (Citations include Carter v.

Estelle, 519 F2d 1136 (5th Cir. 1975)).

c) That the wrongs alleged by the Plaintiff have continued for eleven (11) years, and thus the ruling at bar is contrary to Hernandez v. City of Lafayette, 643 F2d 1188, 1200 (5th Cir. 1981) because the defendant herein has been given a "realistic opportunity and reasonable time within which to . . . correct the inequity", notwithstanding restraining order, permanent injunction, citation for contempt, and numerous hearings.

d) That the ruling at bar is erroneous because the citation of defendant's motion as being pursuant to Ga. Code Ann. 81 A - 112(h), and relied upon by the Court, may not be

used to dismiss a portion out of a petition but only an entire petition if there is not a single claim in the petition; it is in the nature of a general demurrer, and furthermore said paragraph 16 was filed in 1975 and was unobjected to until now and dismissal will not lie by reason of laches; also the motion excluded evidence already taken.

V. With respect to attorney fees, the jury will be instructed to answer the following query:

If you should find from the evidence that Fulton County has acted in bad faith, or has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, you may award attorney fees and other expenses of litigation to

the Plaintiff. You should answer on the Verdict by either Yes or No. If your answer is Yes, the amount will be determined later by the Court.

Said amount, if any, will be determined at a later hearing. The defendant does not concede that any attorney fees are warranted in any amount, and by participation in any attorney fee hearing does not so concede.

The citation for contempt filed on Sept. 12, 1979, by the Plaintiff against the Defendant, and evidence taken on Nov. 19, 1979, will not be ruled upon prior to jury verdict.

IT IS SO ORDERED.

This 16th day of February, 1982.

/s/ Ralph H. Hicks

Ralph H. Hicks, Judge

Superior Court of Fulton County, A.J.C.

V E R D I C T

WE, THE JURY, FIND AS FOLLOWS:

Damages for plaintiff for depreciation in market value of plaintiff's property caused by the surface waters the County willfully diverted onto property of plaintiff.....$_____

Damages for plaintiff for deprivation of use and enjoyment of plaintiff's property.....$_____

Damages for plaintiff for cost of money and labor expended to try to relieve or reduce or offset damages, and consequential damages to plaintiff, and injuries therefrom.....$_____

The Jury will answer the following question:

If you should find from the evidence that Fulton County has acted in bad faith, or has been stubbornly litigious,

or has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, you may award attorney fees and other expenses of litigation to the plaintiff. You should answer on the Verdict by either Yes or No. If your answer is Yes, the amount will be determined later by the Court.....Answer: _____

(Yes or No)

If the Jury finds against the plaintiff on all of the above, your form of verdict would be: We find for the defendant, Fulton County - Answer: _____

(Yes or No)

This _____ day of _____1982

_____

Foreman

Fulton County v. Baranan; 240 Ga. 837 (1978) - Excerpts:

. . . The right of a property owner to recover against a county for damages to his property because of public improvements made by this county is by reason of the constitutional provision (Constitution of 1976, Art. I, Sec. III, Par. I; Code Ann. §2-301) that private property shall not be damaged for public purposes without just and adequate compensation being paid; and the measure of damage is the actual depreciation in market value of the premises resulting from the work done and the effect upon the property. . . .

. . . Since the damages recoverable in a case like the present one are a substitution for the damages recoverable in a condemnation action, there is no

constitutional or statutory authority for the recovery of punitive damages against a county. . . .

. . . The constitutional provision for the payment of just compensation for the damaging of private property would require that Baranan be compensated for damages to his property after the grant of the interlocutory injunction if the county did not obey the injunction and abate the nuisance. . . .

. . . On another trial of the case the issue of damages to be decided by the jury will be the depreciation in the market value of Baranan's property caused by the surface water the county diverted onto his property. . . .

. . . HILL, Justice, concurring.

I concur in Justice Jordan's opinion. In doing so, however, I would not

want to be understood as limiting the plaintiff's right of recovery to the eminent domain provision (§2-301) of our constitution: "Private property shall not be taken, or damaged, for public purposes, without just and adequate compensation being first paid. . . ." I would find that the right of a property owner to recover against a governmental body for damages to his property arises also from §2-101 of our constitution which provides that no person shall be deprived of his property except by due process of law.

According to Young v. McKenzie, 3 Ga. (Kelly) 31, 42 (1847), our eminent domain requirement of just and adequate compensation comes from the 29th chapter of Magna Charta, which is also the source of the due process provision, see

Constitution of the United States of America, Revised and Annotated, Library of Congress, Amendment 5, pp. 1137-1138 (1972). Magna Charta provided: "No freeman shall be taken, or imprisoned, or disseised of his freehold, or liberties, or otherwise destroyed, but by lawful judgment of his peers, or by the law of the land." Young v. McKenzie, supra.

Duffield v. DeKalb County, 242 Ga. 432 (1978) - Excerpts:

. . . In Fulton County v. Baranan, 240 Ga. 837 (242 SE2d 617) (1978), we pointed out that certain nuisance suits for injunction and damages could be maintained against a county under the constitutional provisions against taking or damaging private property for public purposes. Ga. Const. 1976, Art. I, Sec. III, Par. I (Code Ann. §2-301). Also Ga. Const. 1976, Art. I, Sec. I, Par. I (Code Ann. §2-101); Fulton County v. Baranan, supra, Hill, J., concurring (deprivation of property without due process of law); Miree v. United States of America, 242 Ga. 126 (1978). Therefore, the Constitution provides for a waiver of sovereign immunity where a county creates a

nuisance which amounts to an inverse condemnation. . . .

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

AARON BARANAN,	)	
Plaintiff,	)	CIVIL ACTION
vs.	)	FILE NO. B-87694
FULTON COUNTY,	)	
Defendant,	)	

JUDGMENT AND DECREE

The above stated case having come on regularly to be heard, with the intervention of a jury, and after hearing evidence and argument of counsel and the charge of the Court the said jury returned a verdict as follows, to wit:

There exists a nuisance and it is abatable. The jury further found damages in favor of plaintiff in the amount of $400.00 to October 17, 1973; and the jury found damages in favor of plaintiff in the amount of $12,000.00 from October 17,

1973 to September 29, 1975; and the jury found, in addition, exemplary (Punitive) damages in favor of plaintiff in the amount of $15,000.00.

It is therefore Considered, Ordered, Adjudged and Decreed that:

The defendant, Fulton County, be and it is hereby permanently restrained and enjoined from maintaining the aforesaid nuisance of discharging upon plaintiff's property surface water and garbage and debris in any quantity in excess of the amount that the existing draws or drain ditches can and will accommodate and have heretofore accommodated without flooding plaintiff's property and eroding same.

It is further Considered, Ordered, Adjudged and Decreed that plaintiff have and recover the sum of $400.00 damages to October 17, 1973, and the sum of

$12,000.00 from October 17, 1973 to September 29, 1975, as damages and the plaintiff, in addition to the above, shall have and recover the sum of $15,000.00 as exemplary (Punitive) damages; with $_____Costs and it is so ordered.

This 26th day of May, 1977.

/s/ Elmo Holt

JUDGE, SUPERIOR COURT

ATLANTA JUDICIAL CIRCUIT

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

AARON BARANAN,	)	CIVIL ACTION
Plaintiff	)	NO. B-87694
v.	)	
FULTON COUNTY,	)	
Defendant	)	

O R D E R

The within matter coming on regularly to be heard upon a rule nisi, and after hearing evidence and arguments of counsel and after consideration of briefs filed by the parties, the Court makes the following findings of fact and conclusions of law.

Findings of Fact

1. That Fulton County, seeking to correct a dangerous accumulation of surface water on Powers Ferry Road west of the intersection of Rebel Trail whereon

plaintiff owns property and lives, constructed a catch basin on either side of Powers Ferry Road at its intersection with Rebel Trail.

2. That said catch basin catches and accumulates water theretofore running north on Powers Ferry Road and beyond Rebel Trail.

3. That prior to construction of said catch basins or contemporaneously therewith, the county raised or otherwise altered the curbing along Powers Ferry Road east of Rebel Trail which caused surface water to run downhill and west toward Rebel Trail and into said catch basins, and prevented or diminished the run off of surface water onto property fronting on Powers Ferry Road south of Rebel Trail.

4. The county then proceeded to lay a 24" drainpipe extending south along Rebel Trail to a 12" drainpipe already emptying on plaintiff's property certain surface water running downhill from areas other than from the said catch basins. Said existing drain onto plaintiff's property had been there for a period prior to the construction by the county aforesaid, and was accommodated and drained across plaintiff's property by a draw or open drain ditch.

5. That the aforesaid construction by the county caused surface water to drain and flow onto plaintiff's property in greater quantity, with greater force and in a concentrated or funneling manner, overflowing said draw or drainage ditch, causing flooding of plaintiff's property and accumulating garbage and

debris upon plaintiff's property when the flooding would recede.

6. The flooding of plaintiff's property as aforesaid, and the force of the concentrated flow onto plaintiff's property has caused erosion of plaintiff's property and periodic pooling of water on said property at or near plaintiff's residence and the foundation thereof.

7. Plaintiff is deprived of the use of his property when it is flooded and underwater, and his property is littered with garbage and debris, causing unsightly and troublesome effort in cleaning up after heavy rains and accumulation of surface water in said catch basins and discharge of same upon his property.

Conclusions of Law

1. The county's construction and resultant condition aforesaid imposes

upon the plaintiff the burden of the receipt and acceptance of surface water upon his property other than in its natural flow.

2. The same constitutes a nuisance and should be abated as in violation of plaintiff's legal rights.

WHEREFORE, IT IS CONSIDERED, ORDERED AND ADJUDGED that the defendant, Fulton County, be and it hereby is restrained and enjoined from maintaining the aforesaid condition of discharging upon plaintiff's property surface water and garbage and debris in any quantity in excess of the amount that the existing draw or drain ditch can and will accommodate and has heretofore accommodated without flooding plaintiff's property and eroding same.

FURTHER, the defendant, Fulton County, is restrained and enjoined from maintaining the aforesaid nuisance.

All until further Order of this Court.

This September 29, 1975.

/s/ Elmo Holt

JUDGE, SUPERIOR COURT, A.J.C.

Baranan v. Fulton County, 232 Ga. 852 (1974) - Excerpts:

. . . The following facts were developed by the evidence at the hearing: Fulton County determined that it was necessary for public purposes to make changes in the drainage system of the surface waters falling on Powers Ferry Road and Rebel Trail. . . .

. . . The changes made by the County consist of the removal of a hump or berm at the intersection of Powers Ferry Road and Rebel Trail which formerly prevented large quantities of the water flowing down Powers Ferry Road from entering Rebel Trail and thereafter flowing across the appellant's property; the installation of a catch basin on each side of Powers Ferry Road at its intersection with Rebel Trail to remove the surface

water from Powers Ferry Road; and the installation of a 24-inch pipe, to replace a 12-inch pipe, which will discharge surface water on the appellant's property. . . .

. . . The appellant argues that a court of equity is authorized to enjoin the county from making changes in its drainage system which will increase the flow of surface water on his property, and will create a continuing nuisance, until and unless the right to discharge such increased water is acquired by condemnation. . . .

. . . It has been repeatedly held that a right of action arises by necessary implication against a county when it violates a constitutional right of a citizen. . . .

. . . The appellee concedes that the declaration of the Constitution that private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid (Constitution, Art. I, Sec. III, Par. I; Code Ann. §2-301) gives rise to an action for damages against the county for injuries to private property caused by public improvements. . . .

. . . In (citation), it was held that an action in ejectment, or complaint for land, could be maintained against a county, applying the principle that the right of action would arise by necessary implication from the constitutional provision (Code Ann. §2-301) above cited. This case illustrates the fact that the form of action is unimportant where the

right of action arises under the Constitution . . . .

IN THE SUPERIOR COURT FOR THE COUNTY OF FULTON

STATE OF GEORGIA

AARON BARANAN,	)	
Plaintiff,	)	CIVIL ACTION
vs.	)	FILE NO. B-87694
FULTON COUNTY,	)	
Defendant.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1. Plaintiff is owner of tract of land fronting on Rebel Trail in the unincorporated area of Fulton County.

2. Rebel Trail intersects Powers Ferry Road a short distance from plaintiff's property.

3. Fulton County is in the process of making changes in the drainage system of the surface waters falling on Powers Ferry Road and entering Powers Ferry Road

at elevations higher than the intersection of Powers Ferry Road and Rebel Trail and plaintiff's property.

4. The County has determined that such changes are necessary in the interest of public safety and in order to maintain the surface of Powers Ferry Road and to meet the requirements of the State Highway Department with reference a State Aid Road lying below the intersection of Powers Ferry Road and Rebel Trail.

5. Because of the history of traffic accidents on Powers Ferry Road in this vicinity attributed to the presence of surface water the determination of the County to make these changes in the drainage system was a reasonable exercise of discretion.

6. The changes in the drainage system basically consist of two items:

(a) . . . The result of this change will be to allow somewhat more water to enter Rebel Trail and subsequently to flow across plaintiff's property. . . .

(b) . . . and the installation of a twenty-four inch pipe running along the County-owned right-of-way of Rebel Trail to a swale or shallow ravine, where the water will be discharged, running thence through this swale across plaintiff's property to a small creek.

7. As a result of this change in the drainage system more water will flow across plaintiff's property than before the change. . . .

11. . . . Fulton County has the responsibility and authority for laying out, building, altering and maintaining Powers Ferry Road and Rebel Trail, public roads of the County.

CONCLUSIONS OF LAW

5. . . . If the plaintiff's property is damaged because of this public work the plaintiff may recover compensation for such damage under the Constitutional provision that:

"Private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid. . . .

. . . IT IS THEREFORE CONSIDERED ORDERED AND ADJUDGED that Plaintiff's prayers for temporary restraining order and interlocutory injunction be and the same hereby are denied.

This 31st day of October, 1973.

/s/ Elmo Holt

Elmo Holt, Judge,

Superior Court, A.J.C.